FILED
FEB 27 2002
CLERK

No. 01-417

In the Supreme Court of the United States

ROBERT J. DEVLIN, PETITIONER

v.

ROBERT A. SCARDELLETTI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

MARLEIGH D. DOVER
IRENE M. SOLET
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID M. BECKER
General Counsel

JACOB H. STILLMAN
Solicitor

ERIC SUMMERGRAD
Deputy Solicitor

HOPE HALL AUGUSTINI
Senior Litigation Counsel
Securities and Exchange Commission
Washington, D.C. 20549

38 pp

QUESTION PRESENTED

Whether, or in what circumstances, a non-named class member who objects to a class action settlement may appeal a district court judgment approving the settlement.

TABLE OF CONTENTS

	Page
Interest of the amici	1
Statement	2
Summary of argument	6
Argument:	
A class member may appeal a judgment approving a class action settlement over his objection by intervening for the limited purpose of taking such an appeal	8
A. This Court's quasi party cases support allowing objecting class members to appeal	9
B. The federal rules specify intervention as the means by which non-named class members may enter the action	12
C. In the typical case, an objecting class member will be entitled to intervene for the limited purpose of taking an appeal	18
D. The intervention procedure promotes both fairness and efficiency	21
E. The court of appeals properly rejected petitioner's appeal in this case	27
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Alaska v. *Suburban Propane Gas Corp.*, 123 F.3d 1317 (9th Cir. 1997)	16
Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997)	8
American Pipe & Constr. Co. v. *Utah*, 414 U.S. 538 (1974)	19, 23
Associated Builders & Contractors v. *Perry*, 115 F.3d 386 (6th Cir. 1997)	20

Cases—Continued: Page

Auto Workers v. *Scofield*, 382 U.S. 205 (1965) 10
Baker v. *Wade*, 769 F.2d 289 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986) 16
Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988) 13
Bayard v. *Lombard*, 50 U.S. (9 How.) 530 (1850) 10
Becker v. *Montgomery*, 121 S. Ct. 1801 (2001) 13
Bell Atlantic Corp. v. *Bolger*, 2 F.3d 1304 (3d Cir. 1993) 22
Blossom v. *Milwaukee R.R.*, 68 U.S. (1 Wall.) 655 (1863) 6, 10, 11
Brand Name Prescription Drugs Antitrust Litig., In re, 115 F.3d 456 (7th Cir. 1997) 19-20
Bryant v. *Yellen*, 447 U.S. 352 (1980) 16, 27
California Pub. Employees' Ret. Sys. v. *Felzen*, 525 U.S. 315 (1999) 27
Chardon v. *Soto*, 462 U.S. 650 (1983) 23
Crawford v. *Equifax Payment Servs., Inc.*, 201 F.3d 877 (7th Cir. 2000) 27
Crown, Cork & Seal Co. v. *Parker*, 462 U.S. 345 (1983) 20
Diamond v. *Charles*, 476 U.S. 54 (1986) 9
Duhaime v. *John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999) 24
Edwards v. *City of Houston*, 37 F.3d 1097 (5th Cir. 1994) 20
General Tel. Co. v. *Falcon*, 457 U.S. 147 (1982) 23
Guthrie v. *Evans*, 815 F.2d 626 (11th Cir. 1987) 25
Hansberry v. *Lee*, 311 U.S. 32 (1940) 9, 11
Hovey v. *McDonald*, 109 U.S. 150 (1883) 11
Karcher v. *May*, 484 U.S. 72 (1987) 10
Kneeland v. *American Loan & Trust Co.*, 136 U.S. 89 (1890) 11
Leaf Tobacco Bd. of Trade, Ex parte, 222 U.S. 578 (1911) 10

Cases—Continued: Page

Marino v. *Ortiz*, 484 U.S. 301 (1988) 9-10, 15, 16
Mars Steel Corp. v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677 (7th Cir. 1987) 21
Martin v. *Wilks*, 490 U.S. 755 (1989) 11
Matsushita Elec. Indus. Co. v. *Epstein*, 516 U.S. 367 (1996) 29
Minnesota Co. v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609 (1864) 11
NAACP v. *New York*, 413 U.S. 345 (1973) 19
Navigant Consulting, Inc., Sec. Litig., In re, 275 F.3d 616 (7th Cir. 2001) 9, 17
Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 8, 9, 21
Peralta v. *Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988) 28
Schiavone v. *Fortune*, 477 U.S. 21 (1986) 13
Snell v. *Allianz Life Ins. Co.*, No. Civ. 97-2784, 2000 WL 1336640 (D. Minn. Sept. 8, 2000) 16
Stone Container Corp. v. *United States*, 229 F.3d 1345 (Fed. Cir. 2000), cert. denied, 532 U.S. 971 (2001) 13
Stringfellow v. *Concerned Neighbors in Action*, 480 U.S. 370 (1987) 26
Supreme Tribe of Ben-Hur v. *Cauble*, 255 U.S. 356 (1921) 8
Synthroid Mktg. Litig., In re, 264 F.3d 712 (7th Cir. 2001) 26-27
Torres v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988) 13
Trbovich v. *United Mine Workers of America*, 404 U.S. 528 (1972) 20
Trustees v. *Greenough*, 105 U.S. 527 (1881) 11
United Airlines, Inc. v. *McDonald*, 432 U.S. 385 (1977) 6, 7, 15, 19

Cases—Continued: Page

United States v. *AT&T*, 642 F.2d 1285 (D.C. Cir. 1980) 20, 26
United States v. *Chicago*, 908 F.2d 197 (7th Cir. 1990), cert. denied, 498 U.S. 1067 (1991) 26
United States ex rel. Louisiana v. *Jack*, 244 U.S. 397 (1917) 10
West v. *Gibson*, 527 U.S. 212 (1999) 29
West v. *Randall*, 29 F. Cas. 718 (C.C.D.R.I. 1820) (No. 17,424) 12
Williams v. *Morgan*, 111 U.S. 684 (1884) 11
Yniguez v. *Arizona*, 939 F.2d 727 (9th Cir. 1991) 16

Statutes and rules:

Private Securities Litigation Reform Act of 1995, 15 U.S.C. 78u-4 (Supp. V 1999) 2, 22
28 U.S.C. 2072(b) 12
29 U.S.C. 1054(g)(1) 2
Fed. R. App. P.:
Rule 3 17
Rule 3(b)(2) 25
Rule 3(c) 17
Fed. R. Civ. P.:
Rule 1 13
Rule 23 ..... *passim*
Advisory committee note 14
Rule 23(a) 8
Rule 23(a)(4) 20
Rule 23(b) 8
Rule 23(b)(1) 3
Rule 23(b)(3) 13
Rule 23(c)(3) 13
Rule 23(d)(2) 13, 14
Advisory committee note 13, 14
Rule 23(d)(3) 13, 14
Advisory committee note 13, 14
Rule 23(e) 3, 4, 19, 21

Rules—Continued: Page

Rule 23(e)(4) 16, 22, 24
Rule 23.1 27
Rule 24 ..... 4, 6, 13, 14, 16, 27
Rule 24(a) 18, 20, 25
Rule 24(a)(2) 7, 13, 14, 18, 20, 25
Advisory committee note 14
Rule 24(c) 26

Miscellaneous:

J. Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215 (1983) 21
Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts* (1996) 23
26 *Federal Procedure, Lawyers Edition* (1984) 15
H.R. Rep. No. 50, 104th Cong., 1st Sess. (1995) 22
H.R. Rep. No. 369, 104th Cong., 1st Sess. (1995) 22
J. Macey & J. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1 (1991) 21
J. Moore, *Federal Intervention*, 45 Yale L.J. 565 (1936) 15
6 *Moore's Federal Practice* (D. Coquillette, et al., eds., 3d ed. 1997) 14-15, 16, 19, 26
H. Newberg, et al., *Newberg on Class Actions* (3d ed. 1992):
Vol. 2 19
Vol. 3 20
Proposed Rules, 201 F.R.D. 586 (2001) 17, 21, 23, 24
S. Rep. No. 98, 104th Cong., 1st Sess. (1995) 22
J. Story, *Commentaries on Equity Pleadings* (9th ed. 1879) 12

Miscellaneous: Page

C. Wright, et al., *Federal Practice and Procedure: Civil:*
Vol. 7B (2d ed. 1986) 13, 14
Vol. 15A (2d ed. 1992) 20

In the Supreme Court of the United States

No. 01-417

ROBERT J. DEVLIN, PETITIONER

v.

ROBERT A. SCARDELLETTI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

INTEREST OF THE AMICI

The court of appeals held that a non-named class member who objects to a proposed settlement may not appeal an order approving the settlement unless he intervenes in the action. The federal government is a named party in numerous class actions brought under Federal Rule of Civil Procedure 23, and has a substantial interest in the efficient management and fair disposition of class actions in the federal courts. The Securities and Exchange Commission (SEC) has a particular interest in class actions involving securities claims. Such actions enable investors to obtain redress for violations of the federal securities laws, and supplement the SEC's own enforcement efforts. Recent legislation reflects Congress's concerns over the manner in which securities class actions are conducted, including with respect to the

fairness of settlements reached in such litigation. See Private Securities Litigation Reform Act of 1995, 15 U.S.C. 78u-4 (Supp. V 1999).

STATEMENT

1. Petitioner is a retired member of the Transportation Communications International Union (Union) who receives benefits under the Union's ERISA-governed pension plan. In January 1991, the Union adopted an amendment to the plan recommended by its trustees, adding a cost-of-living adjustment (COLA) to pensions every three years. Pet. App. A4-A5. Later that year, new trustees were selected to administer the plan. The new trustees determined that the COLA adjustments implemented by the 1991 amendment would cost much more than had been forecasted, and rescinded the increases for subsequent retirees. As to individuals (such as petitioner) who already were retired when the COLA payments were implemented in 1991, however, the trustees believed that the pension increases were an "accrued benefit" that, pursuant to 29 U.S.C. 1054(g)(1), could not be decreased. Pet. App. A5.

In January 1995, the new trustees filed suit against the old trustees in the United States District Court for the District of Maryland, claiming that the old trustees had breached their fiduciary duties in approving the 1991 amendment to the plan, and seeking damages and a declaration that that amendment was void. Pet. App. A5. The district court concluded that the old trustees had breached their fiduciary duties in approving the amendment, and that the COLA payments were not accrued benefits from the standpoint of pre-1991 retirees. Shortly after the district court's decision, the new trustees amended the plan in 1997 to rescind the COLA for all members, including those who had retired before the 1991 amendment. *Id.* at A6.

2. In October 1997, the new trustees filed this defendant class action in the District Court for the District of Maryland against union members and retirees in anticipation of challenges to the 1997 amendment. The new trustees sought a declaratory judgment that the amendment was either binding on all plan participants or void as to all such participants. The complaint named petitioner as a class representative because he had been active in challenging efforts to repeal the COLA payments, but petitioner refused to serve as a representative and another retiree was named in his place. Pet. App. A6. The district court conditionally certified the class pursuant to Federal Rule of Civil Procedure Rule 23(b)(1) to facilitate a possible settlement. In May 1999, the parties proposed a settlement under which the 1991 COLA increases would be eliminated in exchange for certain other plan benefits. Pet. App. at A7.

Pursuant to Rule 23(e), notice of the proposed settlement was approved by the district court on September 14, 1999, and sent to the class. J.A. 76-79; see J.A. 49-55. The notice informed class members that a hearing would be held on November 12, 1999, concerning the fairness of the proposed settlement, and that class members were entitled to appear and object to the proposed settlement at that hearing as long as they provided written notice of their intention to do so, along with a brief statement of their objections, by October 18, 1999. J.A. 49-50, 52-53, 77-78.

3. While the Maryland class action was pending, petitioner and several other retirees filed their own suit challenging the 1997 amendment in the United States District Court for the Southern District of New York. That court dismissed petitioner's action and, in April 1999, the Court of Appeals for the Second Circuit affirmed the dismissal, pointing, *inter alia*, to the pending Maryland class action involving the same matter. Pet. App. A7-A8. Shortly thereafter, petitioner sent letters to the district judge in the Maryland

class action requesting to intervene in the action. J.A. 34-46. In September 1999, shortly before the district court approved the Rule 23(e) notice, petitioner, through counsel, formally moved to intervene pursuant to Rule 24. J.A. 56-57. In October 1999, while that motion was pending, petitioner submitted objections to the proposed settlement and notice of his intent to appear at the November fairness hearing. J.A. 104-116. At the fairness hearing, the district court rejected petitioner's intervention motion as untimely and, after considering the objections to the proposed settlement (including petitioner's), found that the settlement was fair and reasonable. Pet. App. A9. At the same time, in denying the objections, the court advised petitioner's counsel, "if I'm wrong, you got an appeal." J.A. 154.

The district court entered a final order approving the settlement, J.A. 172-173, and petitioner appealed.[1]

4. The court of appeals affirmed the denial of petitioner's motion to intervene, and held that he otherwise lacked standing to challenge the class action settlement on appeal. Pet. App. A1-A35. The court held that the district court properly found that petitioner's motion to intervene was untimely, especially in light of his demonstrated "interest in the litigation from the outset of the case." *Id.* at A11. The court also pointed to petitioner's delay in filing his intervention motion "until the settlement negotiations were complete," and agreed with the district court that petitioner's intervention would have prejudiced the parties because the "threat of further delay" and "prospect of complicated

[1] The Maryland district court also entered an order—which is not at issue here—barring petitioner from seeking to bring a collateral attack on the class action settlement. J.A. 170-171. Petitioner appealed that order as well. The court of appeals reversed and remanded that order, Pet. App. A25-A29, and on remand the district court reinstated it, J.A. 174-176.

litigation" created by his intervention "might have unraveled the settlement crafted by the parties." *Id.* at A12-A13.

The court then concluded that, having been properly denied intervention, petitioner should not be permitted to challenge the merits of the class action settlement on appeal. Pet. App. A23-A24. In deciding that petitioner's appeal was impermissible, the court weighed both "class management concerns" and "fairness concerns." *Id.* at A21. Siding with the courts of appeals that have refused to allow such objector appeals in the absence of intervention, the court reasoned that "the need for effective class management and to avoid class fragmentation" outweighs concerns with respect to the fairness of settlements in this context. *Ibid.* The Court explained that "[w]e fail to see how effective class management can be accomplished if non-named class members who were not entitled to intervene before the district court can nevertheless usurp the role of the class representatives and, in effect, act as intervenors by contesting the merits of the class settlement on appeal." *Ibid.*

Judge Michael concurred in part and concurred in the judgment. Pet. App. A30-A35. He agreed that petitioner's intervention motion was properly denied as untimely. *Id.* at A30, A34. But Judge Michael would have held that "an unnamed, objecting class member has standing to appeal a district court order approving a class action settlement." *Id.* at A30. In Judge Michael's view, that approach was supported both by "old equity rules" allowing non-parties to appeal decrees that were binding on them and the need "to encourage fair settlements in class action cases," and would not unduly hamper class management. *Id.* at A31-A32. Judge Michael nevertheless concurred in the judgment because he found that the district court's decision to approve the settlement was "well within its discretion." *Id.* at A35.

SUMMARY OF ARGUMENT

Non-named class members who object to a class action settlement may appeal a judgment approving the settlement if they intervene for the purpose of taking such an appeal.

A. The general rule is that only persons who are formal parties to a judgment may appeal it. In a line of decisions, however, this Court has held that certain persons, or "quasi parties," who are not named parties to an action may appeal an order in the action if that order binds their interests. *E.g.*, *Blossom* v. *Milwaukee R.R.*, 68 U.S. (1 Wall.) 655 (1863). In certain respects, non-named class members occupy a position similar to that of the quasi parties that this Court allowed to appeal in those cases, especially insofar as such individuals have had some limited involvement in the district court and may be bound by the order that they seek to appeal. In that regard, the Court's quasi party cases support the conclusion that objecting class members should be permitted to appeal class action settlements. Nonetheless, the historical practice with respect to quasi parties does not dispose of the question of the proper procedure an objecting class member must follow in order to pursue an appeal.

B. The Federal Rules of Civil Procedure specify intervention as the mechanism through which non-named class members may enter the action when necessary to protect their interests as active litigants. Indeed, in 1966, Rules 23 and 24 were amended in important respects to make it easier for absent class members to intervene in class actions because of the recognition that such class members may be bound by a judgment governing the class—the same basic concern underlying the Court's quasi party cases. Furthermore, as this Court itself has recognized, "post-judgment intervention for the purpose of appeal" is an established federal practice. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395 (1977). Accordingly, a proper construction of the Federal Rules

leads to the conclusion that objecting class members who seek to enter the action for purposes of appealing a settlement must intervene to do so.

C. An objecting class member who seeks to intervene for the limited purpose of appealing a class action settlement to which he has objected generally will satisfy Federal Rule 24(a)(2)'s criteria and, thus, be entitled to such intervention as of right. An objector typically will be able to demonstrate the requisite interest by showing that he belongs to the settlement class. As this Court has recognized, such a limited-purpose intervention motion is timely as long as it is filed within the time period for appeal. *United Airlines*, 432 U.S. at 396. And in the typical case, objectors may show that their interests are not adequately represented by existing parties by pointing to the fact that the class representative cannot be expected to appeal the very judgment that he requested the district court to approve.

D. Allowing such intervention for the limited purpose of taking an appeal not only squares with the Federal Rules, but also promotes sound class management. Class action dynamics create incentives for those at the helm of the litigation to settle cases on terms that may be favorable to them but inadequate from the standpoint of the class as a whole or certain class members. An appeal by a class member whose objection has been rejected by the district court provides an added check against such abuse by subjecting class settlements to another layer of judicial scrutiny. At the same time, requiring such limited-purpose intervention enables the district court to perform a valuable screening role in assuring that the person seeking to appeal has the interests necessary to enter the case for the purpose of initiating a new phase of the litigation, and to manage the number of class members who should be permitted to intervene to appeal the same settlement on the same grounds. In addition,

the marginal costs of requiring such intervention are minimal from the standpoint of both objectors and the courts.

E. The court of appeals properly rejected the objector appeal in this case. Petitioner was not entitled to appeal without intervening at all. Although petitioner likely would have been entitled to intervene as of right solely for purposes of taking an appeal if he had requested such intervention, he did not argue in the court of appeals that he was entitled to intervene for that limited purpose and has not presented that issue to this Court.

ARGUMENT

A CLASS MEMBER MAY APPEAL A JUDGMENT APPROVING A CLASS ACTION SETTLEMENT OVER HIS OBJECTION BY INTERVENING FOR THE LIMITED PURPOSE OF TAKING SUCH AN APPEAL

Federal Rule of Civil Procedure 23 establishes a unique device—the class action—for the efficient adjudication of controversies involving multiple persons or interests.[2] The Rule permits one or more named "representative parties" to maintain an action on behalf of a class of similarly situated individuals when certain criteria are met, including a showing that the representatives will "fairly and adequately protect the interests" of the class. Fed. R. Civ. P. 23(a) and (b). Under Rule 23, individuals who are members of the class but are not named as representatives occupy an unusual status. Such class members lack control over the conduct of the litigation that is maintained on their behalf by the class representatives. At the same time, however, they may be

[2] As this Court has recognized, the class action device was not invented by the Federal Rules, but instead has roots in the practices of the English courts of equity. See *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 832-833 (1999); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (19[illegible]; see also *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 366 (1921).

bound by a judgment entered in the action maintained on their behalf. See *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Hansberry* v. *Lee*, 311 U.S. 32, 42-43 (1940).

This case presents the question whether, or in what circumstances, non-named class members who object to a class action settlement may appeal an order approving the settlement. For the reasons explained below, the Court should hold that such class members are required to intervene in the action for purposes of appeal, but that they generally should be entitled to such limited-purpose intervention when they seek it. That approach gives effect both to the historical practice of this Court in allowing persons who are bound and aggrieved by a judgment to appeal it, and provisions of the Federal Rules specifying intervention as the means by which non-named class members may enter the action to protect their interests in a manner that entitles them actually to conduct the litigation, such as by taking an appeal. In addition, this approach promotes sound class management, while accommodating concerns about the fairness of class settlements.[3]

A. This Court's Quasi Party Cases Support Allowing Objecting Class Members To Appeal

1. This Court has long recognized that, as a general matter, persons who are not formal parties to litigation may not appeal orders entered in such litigation. See *Marino* v.

[3] As petitioner has explained (Br. 14-16), there is no constitutional bar to objector appeals in these circumstances. In particular, objecting class members who seek to appeal a class action settlement generally will satisfy the injury and redressability requirements of the Court's constitutional standing doctrine when they are members of the settlement class. Cf. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986). In that regard, "standing" terminology may be inapt in determining whether objectors may appeal. See *In re Navigant Consulting, Inc., Sec. Litig.*, 275 F.3d 616, 620 (7th Cir. 2001).

Ortiz, 484 U.S. 301, 304 (1988) (per curiam) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment is well-settled."); see also *Karcher* v. *May*, 484 U.S. 72, 77 (1987); *Auto Workers* v. *Scofield*, 382 U.S. 205, 208-209 (1965); *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917); *Ex parte Leaf Tobacco Bd. of Trade*, 222 U.S. 578, 581 (1911); *Bayard* v. *Lombard*, 50 U.S. (9 How.) 530, 551 (1850). The orderly resolution of judicial proceedings commands such a rule.

2. As petitioner has explained (Br. 18-22), the Court also has held that, in certain circumstances, persons who are not named parties may appeal an order entered in the case. *Blossom* v. *Milwaukee Railroad*, 68 U.S. (1 Wall.) 655 (1863), is a leading example. There, an individual, Blossom, made a bid for property at a court-ordered foreclosure sale. When the sale was suspended, Blossom—who was not a party to the underlying foreclosure action—asked the district court that had ordered the sale to see that the sale was completed. The court refused his request, and Blossom appealed. The railroad moved to dismiss the appeal on the ground that Blossom was not a party to the foreclosure action. This Court rejected the railroad's argument, explaining:

> It is certainly true that [Blossom] cannot appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject-matter of the litigation, which the court is bound to protect.

Id. at 655-656. The Court characterized such persons as "quasi parties to the proceedings." *Id.* at 656.

Williams v. *Morgan*, 111 U.S. 684 (1884), is to the same effect. There, the Court held that objectors to trustee charges were "quasi parties" entitled to appeal an adverse decision, even though they were not named parties in the underlying litigation. *Id.* at 698. The Court explained that the objectors "had such an interest [in the charges], and were so situated in the cause, that they had a right, by leave of the court, to except and object to the charges and allowances presented by the trustees and receivers, and that they had a right to appeal from the decree of the Circuit Court to this court." *Id.* at 700. In so holding, the Court pointed to decisions—including *Blossom*—recognizing that such quasi parties should be permitted "to come into this court, or to be brought here on appeal, when a final decision of their right or claim has been made by the court below." *Id.* at 699.[4]

3. None of this Court's quasi party cases addresses whether non-named members of a class action, or comparable representative suit, may appeal an order entered in such an action. As petitioner explains (Br. 20), however, in certain respects objecting class members who seek to appeal an order approving a settlement resemble the quasi parties who have been permitted to appeal under this Court's decisions. Such class members may be bound by the order that they seek to appeal, see *Hansberry*, 311 U.S. at 42-43—and, thus, may be "liable to" the order, *Blossom*, 68 U.S. (1 Wall.) at 656—even though they are not named parties. See *Martin* v. *Wilks*, 490 U.S. 755, 762 n.2 (1989). In addition, insofar as they have been formally notified of an opportunity to object

---

[4] See, *e.g.*, *Minnesota Co.* v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633-634 (1864); *Trustees* v. *Greenough*, 105 U.S. 527, 531 (1881); *Hovey* v. *McDonald*, 109 U.S. 150, 155-156 (1883); *Kneeland* v. *American Loan & Trust Co.*, 136 U.S. 89, 94 (1890).

to the proposed settlement and have availed themselves of that opportunity, such class members have been involved in the process resulting in the order that they wish to appeal.[5]

This Court's historical practice with respect to quasi parties accordingly supports the conclusion that a class member who has objected to a proposed class action settlement in the manner provided for by the district court generally should be permitted to appeal an order approving the settlement over his objection. As explained below, however, that practice alone does not dispose of the question presented in this case.

B. The Federal Rules Specify Intervention As The Means By Which Non-Named Class Members May Enter The Action

The Federal Rules of Civil Procedure establish intervention as the mechanism by which non-named class members may enter the action when necessary to protect their interests as active participants in the litigation, including with respect to appeals. Although the Federal Rules should be read in light of the historical practice discussed above, they nonetheless govern the procedures by which federal litigation is conducted. See 28 U.S.C. 2072(b).

1. A Rule of the Federal Rules of Civil Procedure, like a Rule of Criminal Procedure, is "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to

[5] The analogy between non-named class members and the quasi parties of this Court's decisions is supported by other evidence. Justice Story, for example, recognized the rights of members in representative suits to appear in court "as quasi parties to the record, at least for the purpose of taking the benefit of the decree, and of entitling themselves to other equitable relief, if their rights are jeopardied." *West* v. *Randall*, 29 F. Cas. 718, 722-723 (C.C.D.R.I. 1820) (No. 17,424); see also J. Story, *Commentaries on Equity Pleadings* § 409, at 353 (9th ed. 1879).

disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988); see *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988); *Stone Container Corp.* v. *United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000), cert. denied, 532 U.S. 971 (2001). Accordingly, this Court gives effect to the "plain meaning" of the Federal Rules, as construed in light of their purpose and design. *Schiavone* v. *Fortune*, 477 U.S. 21, 30 (1986); see *Becker* v. *Montgomery*, 121 S. Ct. 1801, 1806 (2001); Fed. R. Civ. P. 1. In construing the Rules, the Court also gives "weight" to the Advisory Committee Notes accompanying them. See *Torres*, 487 U.S. at 315-316; *Schiavone*, 477 U.S. at 30-31.

Federal Rules 23 and 24 specifically contemplate that non-named class members may formally enter the action through intervention, when necessary to protect their interests.[6] Rule 23(d)(2) provides that courts may order that notice be given to absent class members advising them of their right "to intervene and present claims or defenses, or otherwise to come into the action." In addition, Rule 23(d)(3) authorizes courts to impose "conditions on the representative parties or on intervenors." At the same time, Rule 24(a)(2) permits intervention as of right when the applicant shows that his interests are not being adequately represented by "existing parties," and the Advisory Committee Note to the 1966 amendment adding Rule 24(a)(2) makes clear that it was intended to protect the interests of non-named class members in particular. See also 7B C. Wright, et al., *Federal Practice and Procedure: Civil* § 1799, at 437 (2d ed. 1986).

[6] Members of classes certified pursuant to Rule 23(b)(3) enjoy an alternative option: they may opt out of the litigation altogether. See Fed. R. Civ. P. 23(c)(3). The class action in this case, however, was not certified pursuant to Rule 23(b)(3).

The evolution of Rules 23 and 24 is similarly telling. As originally adopted, Rule 23 did not mention intervention. The references to intervention were added in 1966, the same year that subsection (a)(2) was added to Rule 24. The Advisory Committee Note to the 1966 amendment to Rule 23 explains that the provision in subsection (d)(2) for notice to class members was intended to "encourage interventions to improve the representation of the class." In the same vein, the note to the 1966 amendment to Rule 24(a)(2) states: "A class member who claims that his 'representative' does not adequately represent him * * * should not be put to the risk of having a judgment entered in the action which by its terms extends to him * * *. Rather, he should, as a general rule, be entitled to intervene." In other words, the 1966 amendments to Rules 23 and 24 not only were designed to facilitate intervention in class actions, but they were motivated by the same concern driving the quasi party cases discussed above—*i.e.*, that absent class members would be bound by the judgment, even though they were not named parties. See 7B C. Wright, et al., *supra*, § 1799, at 437.

2. The fact that non-named class members seek to enter the action for purposes of appeal does not make intervention either unavailable or unnecessary. The Federal Rules clearly contemplate intervention for limited purposes such as appeal. For example, Rule 23(d)(3) authorizes the court to place "conditions * * * on intervenors," and the accompanying Advisory Committee Note states that "imposition of conditions on intervenors may be required for the proper and efficient conduct of the litigation." Likewise, the Advisory Committee Note to Rule 24(a)(2) states that "intervention of right under [this] rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Furthermore, intervention limited to appeal is an established federal practice. See 6 *Moore's Federal Practice*

§ 24.24[3], at 24-99 (D. Coquillette, et al., eds., 3d ed. 1997); 26 *Federal Procedure, Lawyers Edition* § 59:402, at 293 (1984).[7]

This Court itself has recognized that form of intervention practice. For example, in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), a non-named member of a putative plaintiff class moved to intervene in the action shortly after the district court entered a final judgment denying class certification. The district court denied that intervention motion on the ground that it was untimely. This Court disagreed, pointing out that the motion was "filed * * * within the time period in which the named plaintiffs could have taken an appeal." *Id.* at 396. The Court further observed that its ruling was "consistent with several decisions of the federal courts permitting post-judgment intervention for the purpose of appeal." *Id.* at 395-396 & n.16 (citing cases).

Marino v. *Ortiz*, *supra*, is also instructive. That case involved a class action brought by groups representing minority police officers who had challenged certain employment practices. The action was settled by a consent decree. Prior to the approval of the consent decree a group of non-minority police officers—who were not members of the minority class—presented objections to the proposed settlement at a hearing. After the consent decree was approved, the objectors sought to appeal it. This Court held that "because [the appellants] were not parties to the underlying lawsuit, * * * they may not appeal from the consent decree ap-

---

[7] Indeed, intervention for purposes of appeal may be one of the *oldest* forms of intervention practice. See J. Moore, *Federal Intervention*, 45 Yale L.J. 565, 568 (1936) ("[I]ntervention practice in Roman law was rather extensive, although intervention seems to have taken place only at the appeal stage and then on the theory that the losing party might refuse to appeal or might not be vigilant in prosecuting the appeal and the petitioner's interest thus be inadequately protected.").

proving that lawsuit's settlement." 484 U.S. at 304. Citing *United Airlines*, the Court added that "the better practice is for such * * * nonpart[ies] to seek intervention for purposes of appeal," which the objectors had not done. *Ibid.*[8]

To be sure, as the court of appeals in this case recognized, not all courts have required objecting class members to intervene as a prerequisite to appealing an order approving a class action settlement. See Pet. App. A15-A17. In particular, some courts—like the dissent below—have reasoned that objectors should be permitted to appeal without having to intervene because they may be bound by the judgment, and because objector appeals help police against unfair settlements. See *id.* at A31-A32. That approach, however, fails to account for the intervention procedure spelled out in Federal Rules 23 and 24 for non-named class members who seek to enter the action, and the federal practice of intervention for the limited purpose of taking an appeal. Moreover, as explained below (pp. 21-23, *supra*), policy concerns supporting appellate review of class action settlements are fully accommodated by intervention under Rule 24 for the purpose of appeal.[9]

---

[8] Numerous other decisions also recognize the practice of granting intervention for the limited purpose of taking an appeal. See, *e.g.*, *Bryant* v. *Yellen*, 447 U.S. 352, 366 (1980); *Alaska* v. *Suburban Propane Gas Corp.*, 123 F.3d 1317, 1320 (9th Cir. 1997); *Yniguez* v. *Arizona*, 939 F.2d 727 (9th Cir. 1991); *Baker* v. *Wade*, 769 F.2d 289, 291 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986); see also *Snell* v. *Allianz Life Ins. Co.*, No. Civ. 97-2784, 2000 WL 1336140, at *10 (D. Minn. Sept. 8, 2000) (objecting class members may intervene, but solely for purpose of appeal); 6 *Moore's Federal Practice*, *supra*, § 24.24[3], at 24-99 (citing cases).

[9] The Rules Advisory Committee recently discussed the case law in this area in commenting on its proposed amendment to Federal Rule 23(e)(4), which would guarantee the right of class members to object to a proposed settlement. The Committee stated: "A class member may appear and object without seeking intervention. Many courts of appeals, however, have adopted a rule that recognizes standing to appeal only if

3. The Seventh Circuit has reasoned that objecting class members must intervene to appeal on the ground that "Appellate Rule 3 limits appeals to parties." *Navigant*, 275 F.3d at 619. In response, petitioner argues (Br. 17 & n.5) that such class members *are* parties within the meaning of Rule 3 and, therefore, are entitled to appeal. Appellate Rule 3, however, does not grant any right of appeal; it merely governs the "Contents of the Notice of Appeal." Fed. R. App. P. 3(c). As a result, even assuming non-named (and non-intervenor) class members are "parties" within the meaning of Rule 3(c), that Rule would not entitle them to appeal. More to the point, nothing in Appellate Rule 3(c)—or its simple notice requirement—supersedes the intervention mechanism established by the Civil Rules. In deciding this case, the Court should give effect both to the Appellate Rules *and* the Civil Rules by holding that objecting class members are required to intervene for the purpose of appealing a class action settlement, and that objectors who do so must be specified in the notice of appeal.

Amicus Council of Institutional Investors (CII) contends (Br. 12-13) that "[i]t would be at odds with the design of the Federal Rules to absolve class members from intervening for purposes of raising objections in district court but then require them to intervene * * * simply to afford 'standing' in a *court of appeals*." There is a wide gulf, however, between submitting objections that a court may consider in deciding whether to approve a proposed settlement, and taking hold of the reins of a case to press it forward into the court of appeals. In the former situation, the class member

---

the objector has won intervention in the district court. An objector who wishes to preserve the opportunity to appeal is well advised to seek intervention." *Proposed Rules*, 201 F.R.D. 586, 629 (2001) (citation omitted). The Advisory Committee has not proposed any amendment that would alter the intervention mechanism discussed above, or otherwise resolve the question presented here.

is simply providing his input on a question placed before the court by the litigating parties (*i.e.*, the reasonableness of the settlement), while in the latter situation he is actually controlling the course of the litigation.

C. In The Typical Case, An Objecting Class Member Will Be Entitled To Intervene For The Limited Purpose Of Taking An Appeal

The Federal Rules provide for intervention as of right "upon timely application * * * when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). As a general matter, a class member who seeks to intervene to appeal a judgment approving a settlement to which he filed a timely objection will satisfy Rule 24(a)'s interest, timeliness, and inadequate representation requirements and, thus, be entitled to intervene for that limited purpose.

1. Objectors may establish the requisite interest in the action by showing that they belong to the settlement class and thus would be bound by judgment approving the settlement. The members of a plaintiff class action typically have claims for damages or other relief that will be compromised by the settlement. In a defendant class action, settlement may require class members actually to forfeit certain rights or claims. Moreover, as discussed above (at 11), in both types of class actions, the settlement generally is binding on class members and may preclude them from seeking damages or other relief in a subsequent action with respect to any claims adjudicated by the class action.

2. As this Court recognized in *United Airlines*, the "critical inquiry" in determining whether to allow "post-judgment

intervention for the purpose of appeal * * * is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." 432 U.S. at 395-396 (citing *NAACP* v. *New York*, 413 U.S. 345, 366 (1973)). The Court further held that, because the intervention motion in that case was filed "within the time period in which the named plaintiffs could have taken an appeal," it was "timely filed." *Id.* at 396; see 6 *Moore's Federal Practice*, *supra*, § 24.24[3], at 24-99. That rule provides a familiar and readily administrable benchmark to establish the timeliness of an objector's request to intervene for the limited purpose of appeal, and it may be easily met by objectors who wish to take an appeal.

An objector should not be required to intervene *prior to* judgment. Rule 23(e) requires that notice be provided to class members in the event of a proposed settlement, and the practice is to permit class members entitled to such notice an opportunity to object to a proposed settlement before it is approved. See 2 H. Newberg, et al., *Newberg on Class Actions* § 11.55, at 11-132 (3d ed. 1992); J.A. 78-79. The ability to present such objections affords non-named class members an opportunity to voice their views on a proposed settlement in a relatively informal manner, without hiring counsel or intervening. If the court modifies the settlement in response to such objections, or if the court sufficiently explains its reasons for not doing so, the need for an appeal may be obviated altogether. Judicial economy would be ill-served by requiring class members to file prospective motions to intervene simply to preserve their right to appeal in the event a settlement is approved. Cf. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 560-561 (1974).[10]

---

[10] Class members who seek to intervene for purposes other than simply to appeal, such as to obtain discovery or participate directly in the settlement, typically are required to intervene earlier in the proceedings.

3. This Court has stated that Rule 24(a)'s third criterion is "satisfied if the applicant shows that representation of his interest 'may be' inadequate," and that "the burden of making that showing should be treated as minimal." *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972); see 6 *Moore's Federal Practice*, *supra*, § 24.24[3], at 24-99. Inadequate representation will invariably be present when a class member seeks to appeal a judgment approving a class action settlement over his objection, because once the settlement is approved, the class representative's interest will be in preserving the settlement and, thus, in *avoiding* an appeal. See *Associated Builders & Contractors* v. *Perry*, 115 F.3d 386, 391 (6th Cir. 1997); *Edwards* v. *City of Houston*, 37 F.3d 1097, 1108 (5th Cir. 1994); *United States* v. *AT&T*, 642 F.2d 1285, 1294 (D.C. Cir. 1980); 15A C. Wright, et al., *supra*, § 3902.1, at 111 (2d ed. 1992) ("[T]he failure of any other party to appeal would virtually compel the conclusion that the intervenor's interests were not adequately represented.").

In addition, whereas Rule 23(a)(4) requires a representative party to establish that he "will fairly and adequately protect the interests *of the class*" (emphasis added), Rule 24(a)(2) looks only to whether "the *applicant's* interest is adequately represented by existing parties" (emphasis added). As a result, in seeking limited-purpose intervention to appeal, an objector need not show that he is an adequate

---

See *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457-458 (7th Cir. 1997) (citing examples); 3 H. Newberg, et al., *supra*, § 16.06, at 16-31. In addition, because of the significant practical concerns created by having multiple litigating parties in a class action, putative class members are often denied such intervention. See *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350 n.4 (1983). For example, in the settlement context, a non-named class member might seek to intervene to play the role of a spoiler. See p. 26, *infra*. Accordingly, district courts have a great deal more discretion in deciding whether to allow such class members to intervene before any settlement is approved by the court.

representative for other members of the class, or the class as a whole. Nor is he required to disturb any prior finding that the class was adequately represented prior to judgment. The objector need only show that his *own* interests will not be fairly represented *on appeal*, a showing that in most cases may be made simply by pointing to the class representative's interest in forgoing an appeal.

D. The Intervention Procedure Promotes Both Fairness And Efficiency

The foregoing approach not only squares with a plain reading of the Federal Rules, but also advances sound class management.

1. As petitioner (Br. 33-35) and his amici (see CII Br. 17-18) explain, objector appeals provide an important check against unfair class action settlements. The class representative may agree to terms or strike a balance in the settlement that some class members regard as inadequate or unfair. In addition, many class actions are lawyer-driven, in that the named plaintiffs are selected by a lawyer and non-named class members "have individually too little at stake to spend time monitoring the lawyer." *Mars Steel Corp.* v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 681 (7th Cir. 1987); see J. Macey & J. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 3 (1991). And class action lawyers may agree to settlements that are inadequate from the standpoint of the class, because of the prospect of the attorney's fees that would flow from a settlement. See *Ortiz*, 527 U.S. at 852; J. Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 Md. L. Rev. 215, 232 (1983).

Rule 23(e) itself furnishes some protection to absent class members against unfair settlements by providing that class

actions may not be settled without the approval of the court, and that prior notice of the proposed settlement must be given to class members. In addition, the well-settled practice—followed by the district court in this case—is for courts to permit non-named class members to submit objections to a proposed settlement and present such objections at a fairness hearing on the settlement. Nonetheless, there is widespread agreement that increased scrutiny is needed in reviewing class action settlements and, indeed, the Advisory Committee has recently proposed amendments to Rule 23 "to strengthen the process of reviewing proposed class-action settlements." 201 F.R.D. at 617 (Note to Proposed Rule 23(e)).[11]

Objecting class members serve an important role in ensuring that a proposed settlement is tested before it is approved. In particular, because of their direct familiarity with their own claims or grievances, objectors are often in a position to alert courts to the disadvantages or potential improprieties of a proposed settlement. See *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304, 1310 (3d Cir. 1993). As the Advisory Committee recently observed in discussing its proposed amendment to Rule 23(e)(4), which would confirm the right of class members to object to a proposed settlement, an objector might argue that he should not be included in the class definition, or is entitled to different settlement terms.

[11] Congress itself has specified procedures for the appointment of lead plaintiffs and counsel in securities class actions. See Private Securities Litigation Reform Act of 1995, 15 U.S.C. 78u-4 (Supp. V 1999). That Act was motivated by concerns that some lawyers in these actions have engaged in abusive litigation practices, and "often receive a disproportionate share of settlement awards." H.R. Rep. No. 369, 104th Cong., 1st Sess. 36 (1995); see S. Rep. No. 98, 104th Cong., 1st Sess. 6, 12 (1995); H.R. Rep. No. 50, 104th Cong., 1st Sess. 17 (1995). The Act, however, is limited to the securities context, and in any event does not provide complete protection against inappropriate class action settlements.

201 F.R.D. at 628. In other circumstances, the objector might raise broader concerns. Such "objections may be the only means available to provide strong adversary challenges to the reasonableness of the settlement—the parties who have presented the agreement for approval may be hard-put to understand the possible failings of their own good-faith efforts." *Id.* at 629.

Allowing such objectors to intervene for the limited purpose of appealing a settlement that is approved by the district court provides an additional safeguard by ensuring that judgments approving such settlements are subjected to appellate scrutiny. The need for that safeguard is bolstered by evidence that the vast majority of settlements reached in class actions ultimately are approved by district courts. See Federal Judicial Center, *Empirical Study of Class Actions in Four Federal District Courts* 58 (1996) ("Approximately 90% or more of the proposed settlements were approved without changes in each of the four districts.").

2. At the same time, requiring intervention as a prerequisite to appeal promotes efficient class management. See *American Pipe*, 414 U.S. at 553 ("efficiency and economy of litigation * * * is a principal purpose of the [class action] procedure"); accord *Chardon* v. *Soto* 462 U.S. 650, 660 (1983); *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 155 (1982). In particular, requiring objectors to move for limited intervention in the district court—instead of permitting them to go directly to the court of appeals—permits district courts to perform an important screening function.

Even when it is limited in nature, an intervention motion provides the district court with an opportunity to confirm an objector's interest in pursuing an appeal, and to evaluate any opposition that is made to intervention. For example, after the filing of an opposition to such a motion, a court might determine that an objector seeking intervention in fact does not fit within the definition of the settlement class, or

otherwise is not entitled to relief in the class action, perhaps because he obtained redress in some other manner. In addition, an objector might seek to intervene for the purpose of appealing an objection that he did not present in a timely manner to the district court, or that the court resolved in the objector's favor in approving the settlement.[12]

District courts are much better suited than appellate courts to consider such issues in the first instance because of their first-hand knowledge of the litigation and ability to engage in any necessary fact-finding. Furthermore, efficiency in both class management and appellate review is advanced by resolving such issues in the district court before a potentially improper appeal is launched. Indeed, in some cases, a district court's denial of an intervention motion may obviate the need for appellate proceedings and, thus, bring finality to a class action settlement that otherwise might be kept in limbo while a single objector takes an appeal. "Both initial litigation and appeal can delay implementation of the settlement for months or even years, denying the benefits of recovery to class members. Delayed relief may be particularly serious in cases involving large financial losses or severe personal injuries." 201 F.R.D. at 630 (Note to Proposed Rule 23(e)(4)). In other cases, district court consideration of an intervention motion may result in a more concrete factual record for the court of appeals.

---

[12] As the Advisory Committee has observed, "[c]lass settlements at times have been accompanied by separate agreements or understandings." 201 F.R.D. at 623 (Note to Proposed Rule 23(e)). Class members may surrender "objections in return for benefits that would not be available to the objector under the settlement terms available to other class members." *Id.* at 631 (Note to Proposed Rule 23(e)(3)). The existence of such side agreements or terms—whatever their merit or impact on other class members—could eliminate the objector's legitimate interest in appealing. See, *e.g.*, *Duhaime* v. *John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999).

In addition, if numerous requests for intervention are made by objectors seeking to appeal the same class action settlement, a district court could conclude that intervention is inappropriate with respect to objectors who seek to intervene to raise on appeal the same arguments that are going to be pressed by objectors who already have intervened for purposes of appeal. See Fed. R. Civ. P. 24(a)(2); see also *Guthrie* v. *Evans*, 815 F.2d 626, 629 (11th Cir. 1987) (allowing multiple appeals by individual class members "could become unwieldy" and "defeat the very purpose of class action lawsuits"). Although courts of appeals have authority to consolidate duplicative appeals, see Fed. R. App. P. 3(b)(2), district courts typically will occupy a superior vantage point from which to make that determination based on their own familiarity with the case and its actors.

3. Requiring limited-purpose intervention also will impose minimal added costs on district courts and objectors. As a general matter, district courts will have little difficulty in processing such intervention motions because, as discussed above, in the ordinary case it will be evident from the face of the papers that the movant satisfies the criteria for intervention as of right pursuant to Rule 24(a). Nor is there any reason to believe that district courts will be overburdened with such motions because, as both petitioner (Br. 32) and amicus CII (Br. 21) point out, in practice relatively few objectors elect to press appeals.

From the standpoint of objectors, the marginal costs of limited-purpose intervention are also slight. By the time such motions are due (*i.e.*, post-judgment), the objector already will have reviewed the proposed settlement; submitted objections and perhaps appeared at the fairness hearing; evaluated the settlement approved by the court; made a decision to challenge the settlement on appeal; and likely retained counsel along the way. To intervene for the limited purpose of appealing, the objector need only submit a motion

explaining the grounds for intervention and notice pleading stating his claims or defenses. Fed. R. Civ. P. 24(c). As Form 23 of the Civil Rules illustrates, such filing may be brief, and an objector who already has submitted objections and is gearing up for an appeal can easily prepare such a paper.

Petitioner (Br. 39) and amicus CII (Br. 19-20) suggest that requiring intervention would subject objectors to burdensome discovery. As discussed above, however, the Federal Rules permit courts to place conditions on the scope of intervention, and that includes restrictions on discovery. See *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987); *AT&T*, 642 F.2d at 1293; 6 *Moore's Federal Practice*, *supra*, § 24.23[1], at 24-86. More to the point, intervention for the limited purpose of appeal by its terms does not entail intervention for purposes of discovery. Accordingly, any non-named class member who seeks discovery may be required to intervene prior to approval of any proposed settlement, and face greater demands in showing that he should be allowed to intervene. Likewise, objectors who seek intervention for purposes of appeal should not face discovery demands by others, except as may be necessary to confirm their fitness to intervene for that purpose. See p. 24, *supra*.

Nor would requiring such limited-purpose intervention play into the hands of "spoiler[s]." Pet. App. A23; see *United States* v. *Chicago*, 908 F.2d 197, 199 (7th Cir. 1990) ("Litigation will have no end if every time parties resolve amicably (or drop) a point of contention, someone else intervenes to keep the ball in the air."), cert. denied, 498 U.S. 1067 (1991). Objectors who seek to intervene in order to "block the settlement by withholding agreement to its terms," or to frustrate the settlement process by imposing burdensome discovery requests, will not be aided by a rule that allows them to intervene for the sole purpose of taking an appeal.

In re Synthroid Mktg. Litig., 264 F.3d 712, 715 (7th Cir. 2001); see *Crawford* v. *Equifax Payment Servs., Inc.*, 201 F.3d 877, 881 (7th Cir. 2000). As noted above, district courts have much greater discretion in determining whether to allow pre-judgment intervention during the settlement process.[13]

E. The Court Of Appeals Properly Rejected Petitioner's Appeal In This Case

Petitioner's central argument in this Court is that he was entitled to appeal without having to intervene. That argument should be rejected for the reasons discussed above. In the alternative, petitioner briefly argues (Br. 13) that, "if intervention *is* required, the district court erred in refusing to permit petitioner to intervene limited to the right to con-

---

[13] In *California Public Employees' Retirement System* v. *Felzen*, 525 U.S. 315 (1999) (per curiam), this Court considered whether a shareholder who objects to a proposed settlement in a derivative action brought under Rule 23.1 may appeal an order approving the settlement without intervening in the action. The Court affirmed by an equally divided vote without issuing any opinion. In *Felzen*, the federal government took the position that intervention was not required to appeal in those circumstances, pointing, *inter alia*, to the Court's quasi party cases and the role played by appeals in policing unfair settlements. See Br. for Amici U.S. & SEC in *Felzen* at 5-24, *Felzen*, *supra*. The government also stated that "judicial administration is ill-served by requiring absent class members or shareholders to submit formal intervention motions simply to preserve their right to appeal a settlement that has *yet to be* proposed or accepted." *Id.* at 25 n.19 (emphasis added). The government alternatively argued that, if intervention was required, it should be "routinely granted" for the limited purpose of appeal. *Id.* at 28 n.23 (citing *Bryant*, 447 U.S. at 366). On further consideration, the United States and the SEC have concluded that the Court should hold that such limited-purpose intervention is required in answering the question presented here. The approach discussed above will promote the same policy considerations that the government discussed in *Felzen*, while giving effect to the clear design of Federal Rules 23 and 24.

test and subsequently appeal the settlement." See Pet. Br. 41-42. That argument also does not afford a basis for reversal.

Petitioner acknowledges (Br. 6) that he sought to intervene not only to move to oppose the preliminary approval of the settlement, but also to take discovery, secure an injunction, and disqualify class counsel. J.A. 56. As noted above, when parties seek to intervene to participate in the settlement process itself, or otherwise to participate actively as a litigant in the district court, they face greater demands in showing that their motion is timely and that they otherwise are entitled to intervene. In addition, the policy considerations are different in that context, because of legitimate concerns that such intervenor-objectors will act as spoilers. The record in this case firmly supports the denial of petitioner's motion to intervene on the terms petitioner sought. See Pet. App. A10-A14; see also *id.* at A12.

The record indicates that petitioner likely would have been entitled to intervene if he had requested intervention for the limited purpose of appealing the class action settlement. See Part C, *supra*. For at least two reasons, however, it does not appear that reversal of the court of appeals' judgment would be appropriate on the ground that petitioner was entitled to such intervention. First, although petitioner challenged the denial of his motion for full intervention, he did not argue in the court of appeals that he should have been permitted to intervene for the limited purpose of taking an appeal. As a result, the court of appeals did not address that issue. See Pet. App. A10-A14, A30. This Court's practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below." *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988).

Second, petitioner has not properly presented the issue to this Court. Petitioner framed the sole question presented in terms of whether a class member has "standing to appeal"

when "he objects and moves to intervene," without reference to whether intervention is granted or denied. Pet. i. Petitioner did not present the distinct question whether the court of appeals properly affirmed the denial of his motion to intervene. Pet. App. A10-A14; see *West* v. *Gibson*, 527 U.S. 212, 223 (1999) (declining to address "alternative grounds" that "fall outside the scope of the question presented"); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996). To be sure, the body of the petition (at 13) briefly discussed recent Seventh Circuit decisions adopting a limited-purpose intervention approach. But the petition acknowledged (*ibid.*) that those decisions would permit him to appeal "on a different basis" than the decisions of other courts that have permitted appeals without regard to whether the objecting class member was allowed to intervene. See also Pet. Reply Br. 7-9. And even in his merits brief (at 41-42), petitioner is unclear as to the scope of the limited intervention that he claims that the courts below should have granted him.

If the Court concludes that this argument is fairly included within the question presented, but is unable to determine whether the argument was properly raised below, the Court should vacate the judgment below and remand the case to the court of appeals for further consideration of that matter. See *West*, 527 U.S. at 223.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

MARLEIGH D. DOVER
IRENE M. SOLET
Attorneys

DAVID M. BECKER
General Counsel

JACOB H. STILLMAN
Solicitor

ERIC SUMMERGRAD
Deputy Solicitor

HOPE HALL AUGUSTINI
Senior Litigation Counsel
Securities and Exchange Commission

FEBRUARY 2002